

Aug 31, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES METTE,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:16-CV-03142-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 14. Attorney D. James Tree represents James Brian Mette (Plaintiff); Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on March 15, 2012, alleging disability since

1 March 7, 2009 due to Crohn's disease, ulcerative colitis, major depressive disorder,
2 posttraumatic stress disorder (PTSD), obsessive compulsive disorder (OCD),
3 severe chronic gastrointestinal problems, and regular/irregular heartbeat. Tr. 283-
4 292, 328, 337. The applications were denied initially and upon reconsideration.
5 Tr. 162-169, 171-183. Administrative Law Judge (ALJ) Stephanie Martz held a
6 hearing on April 17, 2014 and took testimony from Plaintiff. Tr. 46-57. The ALJ
7 then postponed the hearing to allow for additional evidence to be gathered and
8 associated with the record. Tr. 54-56. The ALJ held a second hearing on July 25,
9 2014 and took additional testimony from Plaintiff and vocational expert, Trevor
10 Duncan. Tr. 58-89. The ALJ issued an unfavorable decision on August 29, 2014.
11 Tr. 18-38. In her decision, the ALJ defined the relevant time period as May 7,
12 2011 through the date of the decision, because Plaintiff had prior DIB and SSI
13 applications that were denied on May 6, 2011. Tr. 18. The Appeals Council
14 denied review on May 19, 2016. Tr. 1-6. The ALJ's August 29, 2014 decision
15 became the final decision of the Commissioner, which is appealable to the district
16 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
17 on July 22, 2016. ECF No. 1.

18 **STATEMENT OF FACTS**

19 The facts of the case are set forth in the administrative hearing transcript, the
20 ALJ's decision, and the briefs of the parties. They are only briefly summarized
21 here.

22 Plaintiff was 37 years old on May 7, 2011. Tr. 283. The highest grade
23 Plaintiff completed was the ninth in 1988. Tr. 329. He reported that he stopped
24 working in March of 2009 due to his conditions. Tr. 328. Plaintiff's work history
25 includes the positions of grill cook, grocery stocker, pizza cook, prep cook, and
26 selector. Tr. 316, 329.

27 **STANDARD OF REVIEW**

28 The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
2 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
3 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
4 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
5 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
6 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
7 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
8 another way, substantial evidence is such relevant evidence as a reasonable mind
9 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
10 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
11 interpretation, the court may not substitute its judgment for that of the ALJ.
12 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
13 findings, or if conflicting evidence supports a finding of either disability or non-
14 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
15 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
16 substantial evidence will still be set aside if the proper legal standards were not
17 applied in weighing the evidence and making the decision. *Browner v. Secretary*
18 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

19 SEQUENTIAL EVALUATION PROCESS

20 The Commissioner has established a five-step sequential evaluation process
21 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
22 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
23 through four, the burden of proof rests upon the claimant to establish a prima facie
24 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
25 burden is met once the claimant establishes that physical or mental impairments
26 prevent him from engaging in his previous occupations. 20 C.F.R. §§
27 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
28 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show

1 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
2 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
3 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If the claimant
4 cannot make an adjustment to other work in the national economy, a finding of
5 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

6 ADMINISTRATIVE DECISION

7 On August 29, 2014, the ALJ issued a decision finding Plaintiff was not
8 disabled as defined in the Social Security Act.

9 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
10 activity since May 7, 2011. Tr. 21.

11 At step two, the ALJ determined Plaintiff had the following severe
12 impairments: affective disorder, anxiety disorder, and polysubstance use disorder.
13 Tr. 21.

14 At step three, the ALJ found Plaintiff did not have an impairment or
15 combination of impairments that met or medically equaled the severity of one of
16 the listed impairments. Tr. 28.

17 At step four, the ALJ assessed Plaintiff’s residual function capacity to
18 perform a full range of work at all exertional levels with the following non-
19 exertional limitations: “He can understand, remember, and carry out simple
20 routine tasks. He needs a routine and predictable work environment. He can have
21 occasional contact with coworkers and supervisors but should not work with the
22 general public.” Tr. 29. The ALJ identified Plaintiff’s past relevant work as short
23 order cook, stock clerk, fast food cook, kitchen helper, industrial cleaner, saw
24 operator, molder operator, and cashier II. Tr. 36. She concluded that Plaintiff was
25 not able to perform any of his past relevant work. *Id.*

26 At step five, the ALJ determined that, considering Plaintiff’s age, education,
27 work experience and residual functional capacity, and based on the testimony of
28 the vocational expert, there were other jobs that exist in significant numbers in the

1 national economy Plaintiff could perform, including the jobs of production
2 assembler, hand packager, and housekeeper. Tr. 38. The ALJ concluded Plaintiff
3 was not under a disability within the meaning of the Social Security Act at any
4 time from May 7, 2011, through the date of the ALJ's decision, August 29, 2014.
5 *Id.*

6 **ISSUES**

7 The question presented is whether substantial evidence supports the ALJ's
8 decision denying benefits and, if so, whether that decision is based on proper legal
9 standards. Plaintiff contends the ALJ erred by (1) failing to find Plaintiff had any
10 physical impairments at step two and (2) failing to accord proper weight to the
11 opinions of Thomas Genthe, Ph.D. and Angelo Ballasiotes, PharmD.

12 **DISCUSSION**

13 **A. Step Two**

14 Plaintiff argues that the ALJ erred at step two by finding that he did not
15 have any medically determinable severe physical impairments. ECF No. 13 at 14-
16 19.

17 Step-two of the sequential evaluation process requires the ALJ to determine
18 whether or not the claimant "has a medically severe impairment or combination of
19 impairments." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation
20 omitted). "An impairment or combination of impairments can be found 'not
21 severe' only if the evidence establishes a slight abnormality that has 'no more than
22 a minimal effect on an individual[']s ability to work.'" *Id.* at 1290. The step-two
23 analysis is "a *de minimis* screening device to dispose of groundless claims." *Id.* In
24 her step two determination, the ALJ found that the evidence did not establish the
25 existence of a medically determinable impairment. Tr. 27.

26 An impairment "must result from anatomical, physiological, or
27 psychological abnormalities which can be shown by medically acceptable clinical
28 and laboratory diagnostic techniques." 20 C.F.R. §§ 404.1508, 416.908 (2016).

1 “A physical or mental impairment must be established by medical evidence
2 consisting of signs, symptoms, and laboratory findings, not only by your statement
3 of symptoms.” *Id.*¹ The regulations also stated that symptoms will not be found to
4 affect a claimant’s ability to do basic work activities, “unless medical signs or
5 laboratory findings show that a medically determinable impairment(s) is present.”
6 20 C.F.R. §§ 404.1529(b), 416.929(b) (2016).² Signs are defined as “anatomical,
7 physiological, or psychological abnormalities which can be observed, apart from
8 your statements.” 20 C.F.R. §§ 404.1528(b), 416.928(b) (2016).³ Laboratory
9 findings are defined as “anatomical, physiological, or psychological phenomena
10 which can be shown by the use of a medically acceptable laboratory diagnostic
11
12

13
14 ¹As of March 27, 2017 20 C.F.R. §§ 404.1508, 416.908 was removed and
15 reserved and 20 C.F.R. §§ 404.1521, 416.921 was revised to state the following:

16 Your impairment(s) must result from anatomical, physiological, or
17 psychological abnormalities that can be shown by medically acceptable
18 clinical and laboratory diagnostic techniques. Therefore, a physical or
19 mental impairment must be established by objective medical evidence
20 from an acceptable medical source. We will not use your statement of
21 symptoms, a diagnosis, or a medical opinion to establish the existence
22 of an impairment(s). After we establish that you have a medically
determinable impairment(s), then we determine whether your
impairment(s) is severe.

23 ²This regulation was also changed as of March 27, 2017, however the quoted
24 material remains.

25 ³As of March 27, 2017, 20 C.F.R. §§ 404.1528, 416.928 was removed and
26 reserved and 20 C.F.R. §§ 404.1502, 416.902 was amended to define signs as “one
27 or more anatomical, physiological, or psychological abnormalities that can be
28 observed, apart from your statements.”

1 techniques.” 20 C.F.R. §§ 404.1528(c), 416.928(c) (2016).⁴

2 The ALJ found that Plaintiff did not have a physical medically determinable
3 impairment because he did not have a diagnosis of Crohn’s disease for his
4 abdominal symptoms, stating that “‘Abdominal pain’ is not a diagnosis.” Tr. 27.
5 To summarize the extensive record in this case, the ALJ provided a chart including
6 the date, location of treatment, citation to the record, and
7 “Complaints/Assessment.” Tr. 22-26. The ALJ failed to consider the medical
8 signs and laboratory findings associated with Plaintiff’s complaints of abdominal
9 pain. *See* Tr. 27. This is error; therefore, the question becomes whether this is
10 harmful error. An ALJ’s error can be considered harmless when “it is clear from
11 the record that the . . . error was inconsequential to the ultimate nondisability
12 determination.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

13 Social Security Ruling (S.S.R.) 96-4p states “In claims in which there are no
14 medical signs or laboratory findings to substantiate the existence of a medically
15 determinable physical or mental impairment, the individual must be found not
16 disabled at step 2 of the sequential evaluation process.” However, that is not the
17 case here. The ALJ referenced the CT Plaintiff received in November of 2011
18 focusing on the provider’s diagnosis of “Possible early diverticulitis,” to the
19 exclusion of the objective results. Tr. 1410. The CT scan as read by Joseph
20 Gouveia, M.D. showed “The bowel pattern demonstrates some mucosal thickening
21 through the sigmoid portion of the colon with a few small diverticula,” and the
22 impression included “findings suggest diverticulosis of the sigmoid colon.” Tr.

24 ⁴As of March 27, 2017, 20 C.F.R. §§ 404.1528, 416.928 was removed and
25 reserved and 20 C.F.R. §§ 404.1502, 416.902 was amended to define laboratory
26 findings to as “one or more anatomical, physiological, or psychological
27 phenomena that can be shown by the use of medically acceptable laboratory
28 diagnostic techniques.”

1 1432. Additionally, Dr. Gouveia found no evidence of definite Crohn's disease.
2 *Id.* The ALJ also relied on a colonoscopy performed by Robert Williams, M.D.
3 and his statement that there was no evidence of Crohn's diseases. Tr. 27.
4 However, testing showed the presence of a benign precancerous adenoma. Tr.
5 1638.

6 No Crohn's disease does not equal no medically determinable impairment.
7 Considering there are medical signs and laboratory findings that have lead medical
8 providers to consider diverticulitis and a precancerous adenoma, this case is not
9 lacking medical findings. Thus, there may be a medically determinable
10 impairment, albeit undefined, because medical signs and laboratory findings show
11 some kind of abnormality. Whether or not that abnormality can be considered
12 severe is unaddressed in the ALJ's decision because she refused to accept the
13 medical signs and laboratory findings. As such, this is harmful error.

14 The case is remanded for the ALJ to address the medical signs and
15 laboratory findings contained in the record and call a medical expert at a new
16 hearing to determine if there is a physical medically determinable impairment and
17 if any physical medical determinable impairment is severe.

18 **B. Medical Opinions**

19 Plaintiff challenges the ALJ's treatment of opinions of Thomas Genthe,
20 Ph.D. and Angelo Ballasiotes, Pharm.D. ECF No. 13 at 6-14.

21 In weighing medical source opinions, the ALJ should distinguish between
22 three different types of physicians: (1) treating physicians, who actually treat the
23 claimant; (2) examining physicians, who examine but do not treat the claimant;
24 and, (3) nonexamining physicians who neither treat nor examine the claimant.
25 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
26 weight to the opinion of a treating physician than to the opinion of an examining
27 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
28 should give more weight to the opinion of an examining physician than to the

1 opinion of a nonexamining physician. *Id.*

2 When an examining physician's opinion is not contradicted by another
3 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,
4 and when an examining physician's opinion is contradicted by another physician,
5 the ALJ is only required to provide "specific and legitimate reasons" to reject the
6 opinion. *Lester*, 81 F.3d at 830-831. The specific and legitimate standard can be
7 met by the ALJ setting out a detailed and thorough summary of the facts and
8 conflicting clinical evidence, stating her interpretation thereof, and making
9 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
10 required to do more than offer her conclusions, she "must set forth [her]
11 interpretations and explain why they, rather than the doctors', are correct."
12 *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir. 1988).

13 **1. Thomas Genthe, Ph.D.**

14 On April 6, 2014, Dr. Genthe completed a Psychological/Psychiatric
15 Evaluation for the Washington State Department of Social and Health Services
16 (DSHS). Tr. 1883-1889. He diagnosed Plaintiff with schizoaffective disorder,
17 social anxiety disorder, OCD, and polysubstance use disorder in sustained
18 remission. Tr. 1885. He opined that Plaintiff had a severe⁵ limitation in the
19 abilities to complete a normal work day and work week without interruptions from
20 psychologically based symptoms and to maintain appropriate behavior in a work
21 setting. Tr. 1886. He also opined that plaintiff had a marked⁶ level of impairment
22 in the abilities to understand, remember, and persist in tasks by following detailed
23 instructions, to perform activities within a schedule, maintain regular attendance,
24

25 ⁵“Severe’ means the inability to perform the particular activity in regular
26 competitive employment or outside of a sheltered workshop.” Tr. 1885.

27 ⁶“Marked’ means a very significant limitation on the ability to perform one
28 or more basic work activity.” Tr. 1885.

1 and be punctual within customary tolerances without special supervision, to adapt
2 to changes in a routine work setting, and to communicate and perform effectively
3 in a work setting. Tr. 1885-1886. Additionally, Dr. Genthe opined that Plaintiff
4 had a moderate⁷ limitation in the abilities to understand, remember, and persist in
5 tasks by following very short and simple instructions, to learn new tasks, to
6 perform routine tasks without special supervision, to make simple work-related
7 decisions, to be aware of normal hazards and take appropriate precautions, to ask
8 simple questions or request assistance, and to set realistic goals and plan
9 independently. *Id.* He further stated that Plaintiff's ability to interact appropriately
10 with the public, to get along with coworkers and/or peers, and to respond
11 appropriately to criticism from supervisors was assessed as fair. Tr. 1886.

12 The ALJ gave Dr. Genthe's opinion no weight because (1) the marked and
13 severe limitations he assessed were out of proportion to the medical evidence, (2)
14 he relied on Plaintiff's unreliable self-reports, and (3) he did not have the
15 longitudinal history of Plaintiff's impairments and knowledge of his substance
16 abuse. Tr. 35.

17 The ALJ's first reason for rejecting Dr. Genthe's opinion, that the opined
18 limitations were out of proportion with the medical evidence, is not legally
19 sufficient. The ALJ failed to state what evidence in the record was inconsistent
20 with specific limitations. Tr. 35. The ALJ is required to do more than offer her
21 conclusions, she "must set forth [her] interpretations and explain why they, rather
22 than the doctors', are correct." *Embrey*, 849 F.2d at 421-422.

23 The ALJ's second reason for rejecting Dr. Genthe's opinion, that he relied
24 on Plaintiff's unreliable self-reports, is legally sufficient. A doctor's opinion may
25 be discounted if it relies on a claimant's unreliable self-report. *Bayliss v. Barnhart*,
26 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti v. Astrue*, 533 F.3d at 1041. But

27 ⁷"Moderate' means there are significant limits on the ability to perform one
28 or more basic work activity." Tr. 1885.

1 the ALJ must provide the basis for his conclusion that the opinion was based on a
2 claimant's self-reports. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).
3 Here, the ALJ states "Dr. Genthe admitted he did not have access to the claimant's
4 treatment records. Thus, . . . he relied on the claimant's presentation and his
5 subjective report of his medical history, symptoms, and limitations." Tr. 35.
6 Plaintiff did not challenge the ALJ's adverse credibility determination. ECF No.
7 13. As such, the ALJ second reason was legally sufficient.

8 The ALJ's third reason for rejecting Dr. Genthe's opinion, that he did not
9 have the longitudinal history of Plaintiff's impairments and knowledge of his
10 substance abuse, is legally sufficient. The ALJ accurately represented Plaintiff's
11 inconsistent statements regarding drug and alcohol use. Tr. 35. The fact that Dr.
12 Genthe could not take into account the critical issue of Plaintiff's drug and alcohol
13 use, because Plaintiff failed to accurately report them, casts doubt on his diagnoses
14 and assessments of Plaintiff's functional limitations. Plaintiff argues that drug and
15 alcohol use were not material to Plaintiff's mental health limitations because all his
16 urine screening were negative for substances. ECF No. 13 at 10. However, the
17 extent to which a medical source is familiar with the other information in a
18 claimant's case record is a factor the ALJ is to consider when weighing medical
19 opinions. 20 C.F.R. §§ 404.1527(c)(6); 416.927(c)(6) (2016).⁸ Considering Dr.
20 Genthe was unfamiliar with the evidence showing Plaintiff's abuse of controlled
21 substances and longitudinal record, the ALJ did not error in providing his opinion
22 less weight.

23 While the ALJ erred in his first reason for providing Dr. Genthe's opinion
24 less weight, he provided other legally sufficient reasons to support his
25 determination. This case is being remanded to address the physical impairments at
26 step two, the ALJ need not address the psychological opinions upon remand if she

27 ⁸These regulations were amended as of March 27, 2017, however the
28 relevant text remains.

1 finds that the step two physical impairments will not have an effect on Plaintiff's
2 the psychological limitations.

3 **2. Angelo Ballasiotes, Pharm.D.**

4 On September 24, 2013, Dr. Ballasiotes completed a mental residual
5 functional capacity assessment. Tr. 1879-1881. He opined that Plaintiff had a
6 severe⁹ limitation in the ability to complete a normal workday and workweek
7 without interruptions from psychologically based symptoms and to perform at a
8 consistent pace without an unreasonable number and length of rest periods. Tr.
9 1880. He found Plaintiff was markedly¹⁰ limited in the abilities to carry out
10 detailed instructions, to maintain attention and concentration for extended periods,
11 to work in coordination with or proximity to others without being distracted by
12 them, to interact appropriately with the general public, to ask simple questions or
13 request assistance, to be aware of normal hazards and take appropriate precautions,
14 and to travel in unfamiliar places or use public transportation. Tr. 1879-1881. Dr.
15 Ballasiotes also found that Plaintiff was moderately¹¹ limited in the abilities to
16 remember locations and work-like procedures, to understand and remember very
17 short and simple instructions, to understand and remember detailed instructions, to
18 carry out very short simple instructions, to perform activities within a schedule,
19 maintain regular attendance and be punctual within customary tolerances, to

21 ⁹Severely limited is defined as the "[i]nability to perform one or more basic
22 work-related activities." Tr. 1879.

23 ¹⁰Markedly limited is defined as "[v]ery significant interference with basic
24 work-related activities i.e., unable to perform the described mental activity for
25 more than 33% of the work day." Tr. 1879.

26 ¹¹Moderately limited is defined as "[s]ignificant interference with basic
27 work-related activities i.e., unable to perform the described mental activity for at
28 least 20% of the work day up to 33% of the work day." Tr. 1879.

1 sustain an ordinary routine without special supervision, to accept instructions and
2 respond appropriately to criticism from supervisors, to maintain socially
3 appropriate behavior and to adhere to basic standards of neatness and cleanliness,
4 and to set realistic goals or make plans independently of others. *Id.* He concluded
5 the opinion by stating “[t]his document was completed with input from the client,
6 Mr. James Mette, with assistance from his mental health case manager.” Tr. 1881.
7 The ALJ gave Dr. Ballasiotes’s opinion no weight because (1) the marked and
8 severe limitations were out of proportion to the treatment records and (2) the form
9 was completed with input from Plaintiff. Tr. 35.

10 Dr. Ballasiotes is a pharmacist, not a medical doctor, and, therefore, is not an
11 acceptable medical source. *See* 20 C.F.R. §§ 404.1513(a), 416.913(a) (2016).¹²
12 Generally, the ALJ should give more weight to the opinion of an acceptable medial
13 source than to the opinion of an “other source,” such as a pharmacist. 20 C.F.R. §§
14 404.1513, 416.913 (2016).¹³ An ALJ is required, however, to consider evidence
15 from “other sources,” 20 C.F.R. §§ 404.1513(d), 416.913(d) (2016),¹⁴ “as to how
16 an impairment affects a claimant’s ability to work,” *Sprague*, 812 F.2d at 1232. An
17 ALJ must give “germane” reasons to discount evidence from “other sources.”
18 *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993). Germane reasons to discount an
19 opinion include contradictory opinions and lack of support in the record. *Thomas*
20

21 ¹²On March 27, 2017, these regulations were amended and the definitions of
22 an acceptable medical source now appear in 20 C.F.R. §§ 404.1502(a), 416.902(a).

23 ¹³On March 27, 2017, these regulations were amended and instructions on
24 how to weigh evidence for cases filed before March 27, 2017 now appear in 20
25 C.F.R. §§ 404.1527, 416.927.

26 ¹⁴On Marcy 27, 2017, these regulations were amended and the instructions
27 on how to weigh “other sources” now appear at 20 C.F.R. §§ 404.1527(f),
28 416.927(f).

1 *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

2 The ALJ's reasons for rejecting Dr. Ballasiotes's opinion, are legally
3 sufficient. The reasons are germane to Dr. Ballasiotes's opinion. As such, the ALJ
4 did not error in his treatment of the opinion. This case is being remanded to
5 address the physical impairments at step two, the ALJ need not address the
6 psychological opinions upon remand if she finds that the step two physical
7 impairments will have no effect on Plaintiff's the psychological limitations.

8 **REMEDY**

9 The decision whether to remand for further proceedings or reverse and
10 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
11 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
12 where "no useful purpose would be served by further administrative proceedings,
13 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
14 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
15 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
16 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
17 (noting that a district court may abuse its discretion not to remand for benefits
18 when all of these conditions are met). This policy is based on the "need to
19 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
20 outstanding issues that must be resolved before a determination can be made, and it
21 is not clear from the record that the ALJ would be required to find a claimant
22 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
23 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
24 F.3d 1172, 1179-80 (9th Cir. 2000).

25 In this case, it is not clear from the record that the ALJ would be required to
26 find Plaintiff disabled if all the evidence were properly evaluated. Further
27 proceedings are necessary for the ALJ to determine whether the medical signs and
28 laboratory findings support the finding of a medically determinable severe

1 impairment and whether that impairment(s) is severe at step two. The ALJ will
2 call a medical expert to testify regarding Plaintiff's physical impairments and
3 resulting limitations. The ALJ is then instructed to make new step three, four, and
4 five determinations based on the new step two determination.

5 **CONCLUSION**

6 Accordingly, **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
8 **DENIED**.

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
10 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
11 additional proceedings consistent with this Order.

12 3. Application for attorney fees may be filed by separate motion.

13 The District Court Executive is directed to file this Order and provide a copy
14 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
15 **and the file shall be CLOSED.**

16 DATED August 31, 2017.

A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE